

BEFORE THE BOARD OF PERSONNEL APPEALS

LOWER FLATHEAD EDUCATION ASSOCIATION,

Complainant,

-vs-

SCHOOL DISTRICT NO. 7-3, LAKE COUNTY,  
CHARLO, MONTANA

Defendant.

FINAL ORDER

ULP#39-76

\*\*\*\*\*

A proposed Findings of Fact, Conclusions of Law and Recommended Order was issued by Hearing Examiner, Ms. Kathryn Walker, on July 25, 1977.

Exceptions to that Proposed Order were filed by Defendant School District on August 16, 1977, and oral argument was heard before the Board of Personnel Appeals on September 23, 1977.

After reviewing the record and considering the briefs and oral arguments, the Board makes the following Order:

1. IT IS ORDERED, that the Exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Proposed Order are denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Order issued by the Hearings Examiner.

Dated this 1<sup>st</sup> day of November, 1977.

BOARD OF PERSONNEL APPEALS

By Brent Cronley  
Brent Cronley  
Chairman

I, Trena Scofield, hereby certify and state that I did  
on the 4th day of November, 1977, mail a true and correct copy  
of the FINAL ORDER in ULP#39 to the following persons:

Hilley & Loring  
Attorneys at Law  
1713 Tenth Ave. So.  
Great Falls, Mt 59401

Richard P. Heinz  
Attorney at Law  
P. O. Box 86  
Lake County Attorney  
Polson, Mt 59860

  
Trena Scofield

1                   BEFORE THE BOARD OF PERSONNEL APPEALS

2       IN THE MATTER OF UNFAIR LABOR PRACTICE #39-76:

3       LOWER FLATHEAD EDUCATION ASSOCIATION,

4                               Complainant,

5       -VS-

6       SCHOOL DISTRICT NO. 7-J, LAKE COUNTY,  
7       CHARLO, MONTANA,

8                               Defendant.

                              } FINDINGS OF FACT,  
                              } CONCLUSION OF LAW,  
                              } AND RECOMMENDED  
                              } ORDER.

9       \*\*\*\*\*

10           On December 6, 1976, the Lower Flathead Education Associa-  
11       tion, affiliated with the Montana Education Association, filed  
12       an unfair labor practice charge with the Board of Personnel  
13       Appeals against Lake County School District No. 7, Charlo,  
14       Montana. An amended unfair labor practice charge was filed in  
15       this matter February 24, 1977.

16           The charge alleged that Section 59-1605(1) (a), R.C.M.  
17       1947, had been violated in that the employer had interfered  
18       with, restrained, or coerced employees in the exercise of the  
19       rights guaranteed in Section 59-1603(1), R.C.M. 1947.

20           The Defendant denied the charge in an answer filed with  
21       the Board of Personnel Appeals March 11, 1977.

22           Therefore a hearing on the matter was held April 28, 1977,  
23       in the Fireside Room, Allentown, Charlo, Montana. The Complainant  
24       was represented by Ms. Emilie Loring of the law firm of Hilley  
25       and Loring, Great Falls, Montana. Mr. Richard Heinz, Lake  
26       County Attorney, Polson, Montana, represented the Defendant.

27           As the duly appointed hearing examiner of the Board of  
28       Personnel Appeals, I conducted the hearing in accordance with  
29       the provisions of the Montana Administrative Procedure Act  
30       (Sections 82-4201 to 84-4225, R.C.M. 1947).

FINDINGS OF FACT

After a thorough review of the entire record of this case, including sworn testimony, evidence, and briefs, I make the following findings of fact:

1. Ms. Roberta Sharp is a tenured teacher in School District No. 7-J, Lake County, Charlie, Montana. From January, 1971, through the 1975-76 school term Ms. Sharp taught second grade in that district. She was employed as a remedial reading teacher in that district during the 1976-77 school term.

2. Ms. Sharp's activities in the Lower Flathead Education Association have included: a) Association president, 1973-74 and 1974-75 school terms; b) negotiator on the Association's negotiating team, 1973-74 school term; c) secretary for the Association's negotiating team, 1975-76 school term.

3. Mr. Michael Lowe is the Superintendent of Schools, School District No. 7-J, Lake County, Charlie, Montana. He has been so employed since July, 1974.

4. While Ms. Sharp had very little contact with Mr. Lowe at the beginning of the 1974-75 school term, a cordial relationship existed between them. At the time, this relationship was not adversely affected by the incident described below:

...I [Ms. Sharp] was the president of the MEA unit and after school had begun some of the agreements in our master contract were not being followed. I went to Mr. Lowe to discuss them and those were essentially that he had changed the hours that we were to come and go from school...He said that since they were in the contract that would have to be the rule of the day, but he would see to it that it was different for next year. (Sharp, tape 036)

5. During negotiations in the spring of 1975 "Mr. Lowe essentially made up the contract, the master contract; that [the teachers] were supposed to use as the MEA contract... it was a rewritten master contract for the MEA". (Sharp, tape 041) Ms. Sharp, who "disagreed wholeheartedly" (Sharp,

1 tape 041) with Mr. Lowe's proposal, attempted to call a meeting  
2 of Association members to discuss the proposal. However,  
3 even though Ms. Sharp followed normal procedure for calling  
4 the Association meeting (i.e., she asked someone in the  
5 school office to announce the meeting), an all staff meeting,  
6 rather than an Association meeting, was announced. At the  
7 all staff meeting the contract proposed by Mr. Lowe was  
8 ratified.

9 6. Mr. Robert Southern, principal at Charlo during the  
10 1974-75 school term, testified that during the spring of 1975  
11 Mr. Dick Kerr, a School Board member, told him, in effect,  
12 "to get Mrs. Sharp." Mr. Southern interpreted this as a  
13 directive to give Ms. Sharp a poor performance evaluation or  
14 to find some means of firing her. Because the comment  
15 was made in passing and because it did not reflect any School  
16 Board action, Mr. Southern disregarded the comment when he  
17 evaluated Ms. Sharp.

18 Further testimony of Mr. Southern indicated that  
19 "it wasn't the only time it [the statement "to get Ms. Sharp"]  
20 was made." (Southern, tape 244)

21 7. In March, 1976, Ms. Sharp's teaching performance was  
22 evaluated by Mr. Young, principal of the elementary school  
23 at Charlo. In this evaluation Mr. Young recommended that  
24 Ms. Sharp be reassigned to grade two. (Complainant's Exhibit  
25 1)

26 8. At the June 14, 1976, school board meeting teaching  
27 assignments for the 1976-77 school term were made. It was  
28 announced that during the 1976-77 school term Ms. Sharp would  
29 function as a remedial reading teacher.

30 a. Mr. Lowe testified that he played a role  
31 in recommending teaching assignments to the School  
32 Board and that he favored Ms. Sharp's assignment  
to the remedial reading program because he felt

1 she would work better in its one-to-one teaching  
2 situation. He alluded to apparently unfavorable  
3 comments about Ms. Sharp's ability to function with  
4 large groups of children in a self contained class-  
5 room. While he stated that there were no documented  
6 comments to this effect, he contended that the March,  
7 1976, evaluation of Ms. Sharp (Complainant's Exhibit  
8 1) indicated that Ms. Sharp "might do a better job  
9 working with smaller amounts [sic] of students".  
10 (Lowe, tape 196)

11 b. Mr. Young was supportive of Mr. Lowe's  
12 recommendation to assign Ms. Sharp to the remedial  
13 reading program, stating that he believed Ms. Sharp  
14 would work better with a smaller group of students.  
15 He referred to "extenuating circumstances that had  
16 come out in one of the board meetings and from  
17 parents", but declined to expand on this statement  
18 "because of confidentiality". (Young, tape 507)

19 c. Mr. Lowe and Mr. Young maintained that  
20 their support of Ms. Sharp's assignment to the  
21 remedial reading program was based on the above-  
22 mentioned considerations, and denied that Ms.  
23 Sharp's Association activities had affected their  
24 recommendation.

25 d. The record established that Ms. Sharp  
26 first became aware of her assignment to the  
27 remedial reading program at the June 14, 1976,  
28 School Board meeting. Neither Mr. Lowe nor Mr.  
29 Young discussed the possibility of the assignment  
30 with her, nor did they inform her of their deci-  
31 sion to make such a recommendation to the School  
32 Board. Ms. Sharp had never asked to be transferred  
from grade two.

1 9. During the 1976-77 school term the remedial reading  
2 program consisted of a Title I Supervisor (a certified teacher),  
3 a Remedial Reading Teacher (a certified teacher: Ms. Sharp),  
4 and three aides. As the Remedial Reading Teacher, Ms. Sharp  
5 was paid at the level on the salary schedule appropriate for  
6 her experience and education. The aides were paid considerably  
7 less.

8 10. The charge in this matter alleged that "Roberta  
9 Sharp...a tenure teacher, [was] demoted to the position of an  
10 aide for the 1976-77 school year...all professional status and  
11 perquisites [were] denied to her...." The following points  
12 were specifically discussed relative to this charge:

13 a. While the Title I Supervisor had what  
14 could be called a classroom, neither Ms. Sharp nor  
15 the aides were assigned a classroom or any parti-  
16 cular place to work.

17 Mr. Lowe testified that the situation was  
18 caused by a lack of available space, that other  
19 classes were also suffering for lack of facilities,  
20 and that the situation would be corrected when a  
21 new building was completed in August, 1977.

22 b. At the first PTA meeting of the 1976-77  
23 school term the teachers, but not the aides, were  
24 introduced to the parents. Ms. Sharp was intro-  
25 duced only after the person making the introduc-  
26 tions for her group, apparently Mr. Young, was  
27 reminded to do so.

28 Mr. Lowe testified that he believed this  
29 to have merely been an oversight, that he was cer-  
30 tain there was no intentional slighting of Ms.  
31 Sharp.

1 c. Ms. Sharp was not given keys as were the  
2 other teachers. She testified that she was not  
3 given any keys at the beginning of the 1976-77  
4 school term, that she was given a desk key only  
5 "after she'd been there awhile" (Sharp, tape 887),  
6 and that even though she requested a key to the  
7 outside door she was not given one until she was  
8 locked out of the building in January, 1977.

9 Mr. Lowe contended that there were a  
10 number of teachers who hadn't received keys to the  
11 elementary school's outside door because the lock  
12 had been changed and enough keys hadn't been made.  
13 Ms. Sharp testified that if it was true that this  
14 lock had been changed "it was not changed suffici-  
15 ently to keep the keys that were kept over the  
16 summer from working in it". (Sharp, tape 593)

17 Mr. Lowe and Mr. Young assumed administra-  
18 tive responsibility for having failed to provide  
19 Ms. Sharp with a key when one had become available.  
20 They denied that there was any intentional depri-  
21 vation, however.

22 d. At the beginning of the school term, Ms.  
23 Sharp and the aides in Title I were called to a  
24 meeting by Mr. Young. According to Ms. Sharp's  
25 testimony, she and the aides were informed that,  
26 due to a confidentiality clause, they weren't to  
27 discuss students' problems with parents or with  
28 other teachers; that if they had a problem they  
29 were to go to the Title I Supervisor who would  
30 contact the parents or teachers.

31 Mr. Lowe and Mr. Young emphasized the  
32 special confidentiality precautions necessary for



1 Title I, but denied that Ms. Sharp had been/  
2 would be denied access to parents, or that  
3 parents had been/would be denied access to Ms.  
4 Sharp. Mr. Young denied that he had ever issued  
5 a directive to Ms. Sharp depriving her of parent  
6 contact, but testified that he had met with the  
7 Title I Supervisor, Ms. Sharp, and the aides at  
8 the beginning of the school term and had said  
9 that comments to parents were to go through  
10 the Title I Supervisor. He testified that these  
11 procedures applied only to Ms. Sharp's Title I  
12 work; that her work under district funds was not  
13 subject to the same rules. However, he said he  
14 had not delineated this distinction at the meeting  
15 because only Title I was being discussed. Apparently  
16 Mr. Young never indicated this distinction to Ms.  
17 Sharp.

18 e. In January, 1977, Ms. Sharp had occasion  
19 to be absent from school. She notified the principal  
20 of this, per procedure used by teachers. When she  
21 returned to school, however, she was reprimanded  
22 for failing to notify the Title I Supervisor of  
23 the absence, which was the procedure used by the  
24 aides. She was subsequently instructed to notify  
25 both the principal and the Title I Supervisor should  
26 she have occasion to be absent thereafter.

27 Mr. Young testified that in the instance  
28 precipitating Ms. Sharp's reprimand in this matter  
29 he assumed responsibility for failing to transmit  
30 the notice of absence to the Title I Supervisor.  
31 He further testified that he then suggested that  
32 Ms. Sharp notify both him and the Title I Super-  
visor to avoid a recurrence of this incident.

1 f. Ms. Sharp testified that she was treated  
2 as an aide regarding noon and recess duty, in that  
3 assignments were made so that there were two  
4 teachers and an aide on duty except on the days  
5 when she was assigned - then there were two teachers  
6 and Ms. Sharp on duty.

7 Mr. Lowe testified he was sure Mr. Young,  
8 who was responsible for the assignments, had not  
9 deliberately assigned Ms. Sharp's duties along  
10 with the aides.

11 g. Ms. Sharp testified that she has been  
12 treated as an aide by the Title I Supervisor - for  
13 example, the Title I Supervisor explained what Ms.  
14 Sharp's duties would be at a meeting attended by  
15 Ms. Sharp and the aides during which she and the  
16 aides "were all treated the same". (Sharp, tape  
17 214) Ms. Sharp further testified that she has been  
18 called an aide by the Title I Supervisor:

19 "When we met with the mothers, she [the  
20 Title I Supervisor] was discussing our  
21 program. She said that she had prepared  
22 the program and set it up as to how it  
23 should run and the aides were carrying  
24 it out. Therefore that included me..."  
25 (Sharp, tape 114)

26 11. Mr. Lowe testified that in Charlie's relatively small  
27 Title I program many of Ms. Sharp's teaching duties were similar  
28 to the aides' duties, but that these basic distinctions existed:

29 "Although they all have direct one on one  
30 contact, the teachers are the ones who  
31 set up individual programs for their kids,  
32 who direct the learning process. The aides  
33 are simply following instructions." (Lowe,  
34 tape 329)

35 "The difference is simply that we feel the  
36 teachers are the ones that have the skills  
37 to evaluate and to understand the needs of  
38 the children." (Lowe, tape 335)

1 Ms. Sharp testified that her work and the  
2 aides' work is essentially the same regarding plan-  
3 ning, use of materials, and student assignments.

4 12. Mr. Lowe stated that the aides are subordinate to Ms.  
5 Sharp, but testified that he has never issued instructions or  
6 explanations to the aides to this effect. Ms. Sharp testified  
7 that she has never been told she has any authority over the  
8 aides and that in practice she exercises no supervision over  
9 the aides.

10 13. The following testimony established that, while it may  
11 be acceptable, desirable, and even advisable that Charlie's  
12 remedial reading program employ two certified teachers, this  
13 is not required by Title I:

14 LORING: Are there Title I requirements that  
15 there be two certified teachers in a program  
of your size?

16 LOWE: ...No...

17 (Loring/Lowe, tape 443)

18 14. While the direct School Board assignment had not been  
19 made at the time of the hearing in this matter, Mr. Lowe and  
20 Mr. Young were recommending that Ms. Sharp be reassigned to  
21 the position of remedial reading teacher for the 1977-78 school  
22 term "if funding were available". (Lowe, Tape 400)

23 15. When asked if Ms. Sharp's assignment as remedial reading  
24 teacher was permanent, Mr. Lowe responded that he:

25 "would certainly hope so. However, each year  
26 funding seems to become more and more of a  
27 problem and it may not be possible that we  
28 maintain the remedial program to as great  
29 an extent as it is right now. I would hope  
30 so. And it seems that we will be able to  
31 next year... I feel that the program has  
32 done an excellent job and I would hate to  
see us limit it by decreasing staff members.  
If there's necessity in decreasing, of  
course the first to go will be the aides."  
(Lowe, tape 401)

DISCUSSION

Section 59-1603(2)(b), R.C.M. 1947, clearly states that it is the prerogative of the public employer to hire, promote, transfer, assign, and retain employees.

Section 59-1605(1)(a), R.C.M. 1947, states that it is an unfair labor practice for a public employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 59-1603, R.C.M. 1947. Namely, these rights include the right of self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits and other conditions of employment and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion.

Basically, the public employer may exercise his right to hire, promote, transfer, assign, and retain employees so long as he does not infringe upon the employees' rights cited above. The issue is not so much whether there is a legitimate basis for hiring, promoting, transferring, assigning or retaining an employee, but whether that basis is the sole reason for the action. Because improper motive distinguishes illegal action from legal action, the motivating cause behind an alleged illegal hire, promotion, transfer, assignment, or retention must be carefully determined.

In NLRB v. Olin-Ann, 84LRM 2585 (10th Cir. 1973), the quality of evidence required to establish improper motive was set forth. The court said at pages 2591 and 2592 that it must be established

by acceptable substantial evidence on the whole record, that the discharge came from the forbidden motives of interference in employee statutory rights. . . . The law requires evidence that extends beyond mere suspicion, that amounts to more than a mere scintilla. . . .

1 However, it is not . . . always necessary for the Board  
2 to explicitly show beyond a reasonable doubt that the  
3 employer had absolute knowledge and was completely  
4 aware of the discharged employees (sic) close connection  
5 to the Union. . . . Where there is substantial  
6 evidence, direct or circumstantial, to indicate that  
7 an employee was discharged for Union activities, a  
8 very definite burden is imposed on the employer to  
9 prove existence of a reason, not within the Act's  
10 provisions, sufficient to warrant the discharge.

11 Applying these comments to the matter at hand, namely  
12 whether or not the transfer of Roberta Sharp from a second  
13 grade teaching position to a remedial reading teaching position  
14 was a legal activity of the School Board, the following factors  
15 were considered:

16 1. Ms. Sharp's status as a teacher was adversely affected  
17 by the transfer. The findings of fact indicated that her function  
18 as a "remedial reading teacher" was indeed more comparable  
19 to that of a teacher's aide than to that of a certified tenured  
20 teacher. The fact that her position was not required within  
21 the program and the tenuous nature of that position's funding  
22 was also considered.

23 2. The reasons given for Ms. Sharp's transfer appeared  
24 to be pretextual, primarily because of the subjective and  
25 arbitrary nature by which the decision was made, the lack of  
26 supportive documentation for the decision, and the lack of any  
27 special qualifications for the position on Ms. Sharp's part.

28 3. The school administration was aware of Ms. Sharp's  
29 Association activities. Prior to the time of the transfer,  
30 there had been disagreements between Ms. Sharp and the school  
31 administration concerning Association activities.

32 4. Prior to the time of the transfer, the desire to undermine  
33 Ms. Sharp's position or to take punitive action against  
34 her was exhibited.

35 5. The manner in which the transfer was handled indicated,  
36 at best, a lack of cooperation and professionalism on the  
37 part of the school administration.

1 The evidence indicating beyond mere suspicion that Ms.  
2 Sharp was transferred because of her Association activities,  
3 and the employer having failed to prove the existence of a  
4 reason sufficient to warrant her transfer, it is determined  
5 that the employer has interfered with, restrained, and coerced  
6 Ms. Sharp in the exercise of her right guaranteed in Section  
7 59-1603, R.C.M. 1947.

8  
9 CONCLUSION OF LAW

10 The allegation that Lake County School District No. 7,  
11 Charlo, Montana, has engaged in an unfair labor practice within  
12 the meaning of Section 59-1605(1)(a), R.C.M. 1947, has been  
13 sustained by the Lower Flathead Education Association in that  
14 Lake County School District No. 7, Charlo, Montana has  
15 interfered with, restrained, or coerced Roberta Sharp in the  
16 exercise of the rights guaranteed her in Section 59-1603(1)(a),  
17 R.C.M. 1947.

18  
19 RECOMMENDED ORDER

20 It is hereby ordered that Lake County School District No. 7,  
21 Charlo, Montana:

22 1. Cease and desist from interfering with, restraining,  
23 or coercing Roberta Sharp in the exercise of the rights guaran-  
24 teed her in Section 59-1603(1)(a), R.C.M. 1947.

25 2. Take the following affirmative action:

26 a.) Offer to Roberta Sharp a regular classroom teach-  
27 ing position for the 1977-78 school term and re-establish as  
28 many perquisites accorded other teachers as possible.

29 b.) Notify the Administrator of the Board of Personnel  
30 Appeals, in writing, within twenty days of receipt of this  
31 decision, what steps have been taken to comply herewith.  
32

1 NOTICE

2 Exceptions may be filed to these Findings of Fact, Con-  
3 clusion of Law, and Recommended Order within twenty days of  
4 service thereof. If no exceptions are filed with the Board  
5 of Personnel Appeals within that period of time, the Proposed  
6 Order shall become the Final Order of the Board of Personnel  
7 Appeals.

8 DATED this 25<sup>th</sup> day of July, 1977.

9  
10 BOARD OF PERSONNEL APPEALS

11  
12 BY Kathryn Walker  
13 Kathryn Walker  
14 Hearing Examiner

15 \* \* \* \* \*

16 CERTIFICATE OF MAILING

17 I, Janice M. Fishburn, hereby certify and state that I  
18 mailed on the 25<sup>th</sup> day of July, 1977, a true and correct copy  
19 of the FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDED  
20 ORDER to the following:

21 Mr. Michael Lowe, Superintendent  
22 School District No. 7-J, Lake County  
23 Charlo, MT 59824

24 Ms. Phyllis Loring, Attorney  
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26 Mr. Richard Helms  
27 Lake County Attorney  
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28 Maurice Hickey, Executive Secretary  
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30 Helena, MT 59601

31 Janice M. Fishburn  
32 Janice M. Fishburn